

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

CROSS MEDIA MARKETING CORP.,
et al.,

Debtors.

Chapter 11
Case No. 03-13901 (BRL)
(Jointly Administered)

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EXTRACT OF BENCH RULING OF MAY 4, 2005
ALLOWING LATE-FILED ADMINISTRATIVE CLAIM

On or about April 13, 2005, Federal Insurance Company (“Federal”), filed and served a motion for the payment of administrative expenses (the “Motion”) in the amount of \$46,143.00 based upon the failure of Reorganized Cross Media, as the successor to Cross Media Marketing Corporation and its wholly-owned subsidiary, Media Outsourcing, Inc., (the “Debtors”), to pay insurance premiums related to a workers compensation policy (the “Policy”). The Policy covered the period October 24, 2002 through October 24, 2003.

Background

On June 16, 2003, the Debtors filed petitions under chapter 11, title 11 of the United States Code, (the “Bankruptcy Code”). As part of the Debtors’ first day motions, an Order was entered authorizing the continuance of certain insurance policies including the Policy and the corresponding payment of the obligations accrued thereunder.

Pursuant to the Order Establishing Deadlines for Filing Administrative Claims and Approving

the Form and Manner of Notice Thereof (the “Administrative Bar Date Order”), the deadline for filing administrative claims was April 13, 2004 (the “Administrative Bar Date”).

On May 19, 2004, this Court confirmed the Debtor’s Plan of Reorganization. Pursuant to Section 8.1 of the Plan the Debtors assumed certain executory contracts, including the Policy [listed as a Chubb Worker’s Compensation Policy].

The initial premium amount billed to the Debtor for the Policy was \$14,672.00. However, a subsequent, post-confirmation audit conducted by Federal determined that the actual premium due totaled \$60,815.00, leaving an additional balance due to Federal of \$46,143.00. The Debtors refused to pay the balance claimed and Federal filed this Motion.

Federal contends that the continuation of coverage under the Policy through the post-petition period benefitted the Debtors and, therefore, the premiums constitute an administrative expense pursuant to section 503(b)(1)(A). Additionally, Federal contends that as an assumed executory contract, the amounts due under the Policy constitute administrative expenses.

The Debtors argue that Federal is barred from asserting its administrative claim based on the issuance of the Administrative Bar Date Order, which set April 13, 2004 as the last day to file administrative claims. The Debtor asserts that Federal simply missed the Administrative Bar Date, failed to secure an extension of time to file its claim, and now, more than a year after the applicable bar date, seeks payment of a purported administrative expense. The Debtor argues that because Federal fails to demonstrate “cause” as required by section 503 of the Bankruptcy Code to file a tardy administrative claim, the Motion must be denied.

Federal asserts that it is exempt from the application of the Administrative Bar Date Order

pursuant to the exception set forth in Paragraph 22 (e) of the Order which states that: “Any person or entity who is asserting an administrative claim which arises and is due and payable in the ordinary course of the Debtors’ businesses. This exception does not apply to those administrative expenses which remain outstanding and unpaid by the Debtors beyond ordinary business terms or prior course of dealings.”

The parties dispute whether the exception applies and specifically, whether the claim is within the ordinary course and/or if so, beyond ordinary business terms.

Discussion

Section 503(a) of the Bankruptcy Code states in pertinent part that: “An entity may timely file a request for payment of administrative expense, or may tardily file such request if permitted by the court for cause.” 11 U.S.C. §503(a). Administrative expenses are generally those that are incurred by the estate after the filing of a voluntary petition. Federal’s claim is an administrative claim because it was incurred by the Debtors’ estates and because the insurance contract was assumed by the estate thereby requiring any prepetition cure amounts to be treated as an administrative claim.

Whether Federal falls within the exception to the Administrative Bar Date Order need not be determined because even if the claim is late-filed, Federal has shown the requisite cause for its tardy filing.

Generally, under the terms of worker’s compensation policies an initial premium is estimated and a final premium is determined by audit at the expiration of the policy term. This is necessary to calculate the actual exposure under a workers compensation policy as the number and type of employees covered fluctuates during the term of the policy.

Federal contends that the delay in conducting its audit was in fact caused by the Debtors' failure to make available the information necessary to calculate the premiums due. According to Federal, upon expiration of the Policy term on October 24, 2003, six separate inquiries were made of the Debtors for payroll information necessary to perform the audit of the Policy. On three occasions - on December 1, 15 and 22, 2003 - a representative of Federal spoke directly with an employee of the Debtors, who promised to provide the information, none of which was forthcoming.

According to Federal, it was not until July 15, 2004 - some three months after the Administrative Bar Date - did Federal receive the requisite payroll information needed to compute the actual premium due. The audit itself was done by early September of 2004. In October and November of 2004, Federal sent two letters requesting payment to counsel for the Debtor, and subsequently provided the Audit Summaries underlying the claim. Non of these factors were rebutted by the Debtor. Accordingly, it does appear that the delay the Debtors complain of was occasioned by their own action or rather inaction.

In addition, the contract between the Debtor and Federal provides that Federal may conduct an audit "within three years after the policy period ends." (See Policy, Part Five, para. G.) Accordingly, the audit was conducted well within the period contemplated by the agreement between the parties.

To the extent that the Debtors have legitimate questions with regard to the actual amounts due, the parties are directed to attempt to reconcile their records.

Conclusion

For the reasons set forth, the Motion for Administrative status is granted with the precise amount to be determined by agreement of the parties. If the parties are unable to agree upon the amount, the parties are instructed to contact chambers for an additional hearing date.

IT IS SO ORDERED.

Dated: May 4, 2005
New York, New York

/s/ Burton R. Lifland
United States Bankruptcy Judge